No. 05-381

OCT 26 2005

IN THE

Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE BELLSOUTH CORPORATION, DOW CHEMICAL CO., DUNN LUMBER CO., INC., MICROSOFT CORPORATION, SBC COMMUNICATIONS INC., AND VERIZON COMMUNICATIONS INC. IN SUPPORT OF PETITIONER

A. DOUGLAS MELAMED
Counsel of Record
JONATHAN E. NUECHTERLEIN
DAVID S. MENDEL
DANIEL MCCUAIG
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000
Counsel for Amici Curiae

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

MARC GARY
ALAN L. SILVERSTEIN
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Suite 1800
Atlanta, GA 30309-3610

Counsel for Amicus Curiae BellSouth Corporation

DUNCAN A. STUART
SCOTT R. PENNOCK
THE DOW CHEMICAL COMPANY
2030 Dow Center
Midland, MI 48674

Counsel for Amicus Curiae Dow Chemical Co.

CHRISTOPHER P. FROST
11120 N.E. 2nd Street
Suite 220
Bellevue, WA 98004

Counsel for Amicus Curiae Dunn Lumber Co.

THOMAS W. BURT
RICHARD J. WALLIS
KEVIN KEHOE
MICROSOFT CORPORATION
One Microsoft Way
Redmond, WA 98052

Counsel for Amicus Curiae Microsoft Corporation

JAMES D. ELLIS
PAUL K. MANCINI
MARTIN E. GRAMBOW
WILLIAM M. SCHUR
SBC COMMUNICATIONS INC.
175 E. Houston Street
San Antonio, TX 78205

Counsel for Amicus Curiae SBC Communications Inc.

JOHN THORNE
PAUL J. LARKIN, JR.
VERIZON COMMUNICATIONS INC.
1515 North Court House Road
Arlington, VA 22201

Counsel for Amicus Curiae Verizon Communications Inc.

QUESTION PRESENTED

Whether the Ninth Circuit erred in embracing a doctrine of "predatory buying" that itself restrains competition by inducing market intermediaries to buy fewer inputs in an upstream market for raw materials and thus to reduce their output in downstream markets for finished products, to the detriment of their trading partners in both markets.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICI 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE DECISION BELOW IS A THROWBACK TO AN EARLIER ERA OF NON-RULE-BASED ANTITRUST ANALYSIS 4

II. THE DECISION BELOW IMPROPERLY IGNORES THE DOWNSTREAM IMPLICATIONS OF PREDATORY BUYING CLAIMS AGAINST MARKET INTERMEDIARIES 9

III. THE *BROOKE GROUP* ANALYSIS IS FULLY APPLICABLE HERE, EVEN APART FROM DOWNSTREAM ANALYSIS 13

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Page(s)

American Tobacco Co. v. *United States*, 328 U.S. 781 (1946) 10

Barry Wright Corp. v. *ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983) 7

Broadcasting Music, Inc. v. *CBS, Inc.*, 441 U.S. 1 (1979) 7

Brooke Group v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) ..... *passim*

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) 5, 6, 8

Cargill, Inc. v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) 3, 11, 12

Concord Boat Corp. v. *Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000) 8

Kartell v. *Blue Shield of Massachusetts, Inc.*, 749 F.2d 922 (1st Cir. 1984) 9

LePage's Inc. v. *3M*, 324 F.3d 141 (3d Cir. 2003) 8

Spectrum Sports, Inc. v. *McQuillan*, 506 U.S. 447 (1993) 5

Verizon Communications Inc. v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) 3, 5

STATUTES

15 U.S.C. § 1 ..... 2, 10

15 U.S.C. § 2 ..... *passim*

OTHER AUTHORITIES

Baumol, William J. & Blinder, Alan S., *Economics: Principles and Policy* (8th ed. 2000) 5

Easterbrook, Frank H., *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972 (1986) 6

Edlin, Aaron S., *Stopping Above Cost Predatory Pricing*, 111 Yale L.J. 941 (2002) 6

TABLE OF AUTHORITIES—Continued

Page(s)

Elhauge, Einer, *Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory—and the Implications for Defining Cost and Market Power*, 112 Yale L.J. 681 (2003) 6

Hovenkamp, Herbert, *The Rationalization of Antitrust Law*, 116 Harv. L. Rev. 917 (2003) 6

Posner, Richard A., *Antitrust in the New Economy*, 68 Antitrust L.J. 925 (2001) 7

In the Supreme Court of the United States

No. 05-381

WEYERHAEUSER COMPANY,

Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE BELLSOUTH CORPORATION, DOW CHEMICAL CO., DUNN LUMBER CO., INC., MICROSOFT CORPORATION, SBC COMMUNICATIONS INC., AND VERIZON COMMUNICATIONS INC. IN SUPPORT OF PETITIONER

This brief is respectfully submitted on behalf of BellSouth Corporation, Dow Chemical Co., Dunn Lumber Co., Inc., Microsoft Corporation, SBC Communications Inc., and Verizon Communications Inc. in support of petitioner Weyerhaeuser Co.

INTEREST OF AMICI

Amici submit this brief to express their common concern about the disruptive consequences of the decision below.[1] Amici and other large firms routinely engage in com-

[1] This brief was prepared in its entirety by amici curiae and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than amici curiae and their counsel. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

petitive bidding for inputs into the goods or services they sell in downstream markets. The decision below exposes such firms to the prospect of treble damages whenever a factfinder, unconstrained by any well-defined legal or economic rules, concludes that the firm bid "too much" for those inputs or bought "too many" of them. Until corrected, that decision will cause large firms throughout the economy to err on the side of purchasing fewer inputs and thus restricting their sale of finished products, to the ultimate detriment of consumers. And, more generally, large firms must inefficiently err on the side of caution in their business practices because they now face the threat of antitrust liability in the Ninth Circuit without clear and administrable rules concerning single-firm decisions about price and quantity. Amici and other companies would benefit from the restoration of sensible and predictable rules in this area.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below holds that a plaintiff may establish antitrust liability under Section 2 of the Sherman Act by persuading a jury that a rival purchased more raw materials "than it needed" from upstream suppliers or paid a higher price for those materials "than necessary, in order to prevent the Plaintiffs from obtaining the [materials] they needed at a fair price." Pet. App. 7a n.8. The Ninth Circuit rejected any limits on a jury's subjective sense of what it means to purchase too many inputs or to pay too much for them. In particular, it held that a market "middleman" may be subject to treble damages for aggressive buying conduct in an upstream input market even if that conduct does not meet this Court's *Brooke Group* test for predatory pricing: *i.e.*, even if the defendant's sales of finished products in the downstream market cover its costs, and even if it would be unable in any event to recoup any losses over the long term.

Thus, a defendant that uses all the inputs it buys can seek to avoid liability under Ninth Circuit law only by buying less and therefore reducing its sales of the finished products. The Ninth Circuit's decision thus contradicts the most fundamental antitrust principles, which encourage increased

output as long as prices do not fall below cost. Indeed, the court's application of Section 2 has the same anticompetitive consequences as would a direct agreement between middlemen to stabilize input prices and allocate purchase quantities—a classic violation of Section 1's prohibition on "conspirac[ies] in restraint of trade." 15 U.S.C. § 1.

The holding below also flies in the face of this Court's recent emphasis on clearly delimiting antitrust liability for single-firm conduct, given the particular risk that indeterminate liability rules in that context will deter economically efficient behavior by large firms. *See, e.g., Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). Indeed, this is one of a number of recent cases in which lower courts have found antitrust liability for whatever single-firm business conduct strikes a jury as "unfair." This Court should reverse the decision below to restore determinacy and economic rigor to antitrust analysis in this critical area.

This case also graphically illustrates the doctrinal incoherence into which the lower courts slip when they disregard this Court's limiting principles on antitrust liability. The Ninth Circuit held below that the normal antitrust principles applicable when a firm *sells* products are inapplicable when the firm *buys* products. In so doing, it disregarded the effects of its ruling on the downstream market for the defendant's finished products. The Ninth Circuit's ruling, that Weyerhaeuser could be held liable for buying too much in the input market even absent evidence that it did not use all the inputs it purchased, in effect subjects a defendant in Weyerhaeuser's position to antitrust liability for not restricting output in its downstream market—that is, for not behaving more like a monopolist in that market. The holding below thus perversely threatens the most basic objectives of antitrust law. And it is difficult, if not impossible, to square the Ninth Circuit's ruling with this Court's decision in *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), which adopted a unified upstream, downstream analysis of

predatory pricing issues concerning market intermediaries like Weyerhaeuser.

Finally, even if it were somehow appropriate to disregard the downstream market in assessing buy-side conduct in the upstream market for inputs, the Ninth Circuit erred in failing to apply the fundamental antitrust principles set forth in this Court's *Brooke Group* decision. The Ninth Circuit read *Brooke Group* as a narrow rule and distinguished it principally on the ground that a defendant that "buys too much" or "pays too much" on the buying side does not thereby produce the immediate consumer benefits that a defendant creates when it cuts prices on the selling side. But that is a distinction without a difference. A basic purpose of the antitrust laws is to promote allocative efficiency: *i.e.*, the efficient allocation of resources to their most highly valued uses. The consumer benefits of an above-cost price cut in a retail market represent one benefit of allocative efficiency, but so do the benefits that input providers derive from a large but non-money-losing bid from an intermediary buyer. Both have the immediate effect of expanding output. In each case, total welfare, and ultimately the interests of consumers, are best served by leaving resource allocation questions to the free play of market forces, rather than to the unconstrained intuitions of juries about the "fairness" of aggressively competitive behavior.

ARGUMENT

I. THE DECISION BELOW IS A THROWBACK TO AN EARLIER ERA OF NON-RULE-BASED ANTITRUST ANALYSIS

"One problem that haunts most antitrust litigation . . . is that vigorous competition may look very similar to acts that *undermine* competition and support monopoly power. The resulting danger is that the courts will prohibit, or the antitrust authorities will prosecute, acts that *appear* to be anticompetitive but that really are the opposite. The difficulty is that effective competition by a firm is always tough on its

rivals."[2] In recent years, this Court has taken this concern increasingly to heart. Since its decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the Court has repeatedly emphasized the need for clear and rigorous principles to ensure that the antitrust laws are enforced "for 'the protection of competition, not competitors.'" *Id.* at 488 (internal citation omitted).

In *Brooke Group* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), this Court adopted such bright-line principles to govern antitrust claims concerning a defendant's unilateral decisions about price and quantity.[3] The Court there held that a monopolist cannot be held liable for charging buyers too little for goods or services unless the plaintiff proves (i) "that the prices complained of are below an appropriate measure of [the defendant's] costs" and (ii) that the defendant has "a dangerous probability of recouping its investment in below-cost prices." *Id.* at 222, 224. When a price cut does not satisfy both of these criteria, the Court concluded, it should remain lawful because it "either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting

---

[2] William J. Baumol & Alan S. Blinder, *Economics: Principles and Policy* 425-426 (8th ed. 2000) (paragraph break omitted). Even more serious, arguably, than penalizing firms for conduct that should be viewed as procompetitive is the danger that courts, by applying unwise rules, will themselves unwittingly compel anticompetitive behavior by inducing firms to restrict their own purchases of inputs and sales of finished products. As discussed below, the Ninth Circuit's decision presents exactly that danger.

[3] In other contexts, too, the Court has imposed strict limits on antitrust liability under Section 2 of the Sherman Act to ensure that antitrust law does not itself thwart competition. *See Trinko*, 540 U.S. at 407 (placing strict limits on any obligation of monopolists to deal with rivals in order, among other reasons, to protect incentives to invest); *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447 (1993) (predicating Section 2 liability on, among other things, proof of either monopoly power or a dangerous probability of obtaining it).

intolerable risks of chilling legitimate price-cutting." *Id.* at 223.

A few critics of *Brooke Group* and other cases delimiting antitrust liability with bright-line principles have expressed concern that such principles can produce "false negatives": *i.e.*, individual cases in which, from the perspective of an omniscient economist, banning particular conduct in a given market would promote greater long-term consumer welfare than would non-intervention.[4] But a fundamental principle of modern antitrust analysis is that neither antitrust judges nor lay juries are omniscient economists.[5] Bright-line principles are thus necessary both to preclude "false positives"—cases in which the antitrust laws ban conduct that, on balance, enhances total welfare—and to reduce market-distorting uncertainty about the extent to which aggressive competition, normally a core virtue in a capitalist economy, will subject a firm to treble damages under the antitrust laws. As then-Judge Breyer explained long before *Brooke Group* was decided: "Rules that seek to embody

---

[4] *See, e.g.*, Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 Yale L.J. 941 (2002); *but see, e.g.*, Einer Elhauge, *Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory—And The Implications For Defining Cost And Market Power*, 112 Yale L.J. 681 (2003) (explaining why criticism is unsound).

[5] *See, e.g.*, Herbert Hovenkamp, *The Rationalization of Antitrust Law*, 116 Harv. L. Rev. 917, 942-943 (2003) ("Judge Posner apparently lacks confidence in the ability of federal judges to identify technical errors or misapplications of theory in expert testimony, and with good reason. . . . When the judge himself lacks the skills to determine whether an expert's report is technically accurate, the worst possible outcome is the one that too often obtains: the judge washes his hands of the matter and gives it to the jury, thus passing the issue off to an even less qualified decisionmaker."); Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972, 976-977 (1986) ("[T]he processes of litigation—especially litigation conducted to lay deciders who may know nothing of the industry and see the inside of a courtroom but once—favor argument based on fair ex post division of gains. . . . To require the defendant to show that its conduct is efficient is to hand victory to the plaintiff in a large number of cases no matter whether the defendant's conduct helped or harmed consumers.").

every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve." *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983).

The Ninth Circuit's decision in this case rejects that tradition by upholding a jury instruction that dispenses with bright-line tests altogether. In the Ninth Circuit, juries may now impose treble damages on any company that, in the jurors' subjective view, "purchased *more* [goods] than it needed" from input suppliers or "paid a *higher* price for [those goods] than necessary, in order to prevent the Plaintiffs from obtaining the [goods] they needed at a *fair* price." Pet. App. 7a n.8 (emphasis added). These are not standards, but empty locutions, devoid of analytical content. They create grave uncertainty about the circumstances in which a firm with market power will violate the antitrust laws by bidding "too much" for inputs, buying "too many" inputs, or otherwise placing rival buyers at an "unfair" disadvantage in getting what they "need." In that respect, the decision is a throw-back to an earlier era in which antitrust factfinders remained free to penalize a large company for conduct that they subjectively considered "unfair," irrespective of the long-term effect of those penalties on consumer welfare.[6]

This concern can arise whenever a lower court finds that, at some level of specificity, the case before it is exempt from the basic principles this Court has adopted to limit claims against firms for their unilateral decisions about price and quantity. Decisions like the Ninth Circuit's holding here

---

[6] As Judge Richard Posner has observed, recent antitrust analysis "reflect[s] a series of emphatic post-*Alcoa* [*United States* v. *Alcoa*, 148 F.2d 416 (2d Cir. 1945)] statements by the Supreme Court that the antitrust laws protect competition in the sense of efficient business practices rather than in the sense of rivalry per se." Richard A. Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925, 931-932 n.7 (2001) (citing, *inter alia*, *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 19-20 (1979); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979)).

thus encourage litigants to argue that the particulars of their cases make them different from this Court's prior cases and therefore not subject to the principles embraced by this Court in those cases. In another recent case, for example, the Third Circuit agreed to treat bundled-product discounts differently from single-product discounts, and to expose firms to potentially enormous liability for offering them, even though the discounts benefited consumers and violated none of the established tests (including *Brooke Group*) for predatory pricing and illegal tying. *See LePage's Inc.* v. *3M*, 324 F.3d 141 (3d Cir. 2003); *see also Concord Boat Corp.* v. *Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000). Indeed, the Third Circuit seized upon the fact that the defendant's bundling arrangement violated neither the rules against predatory pricing nor those relating to tying arrangements as a basis for proceeding to a third, less rigorous analysis, under which the doctrinal limits defining those rules became irrelevant and the defendant could be held liable under a subjective "totality of the circumstances" test. *LePage's*, 324 F.3d at 162-164.

Antitrust, however, should not be subject to this type of stovepipe analysis, under which strict rules apply if a plaintiff pleads a traditional theory of antitrust liability but anything goes if the plaintiff pleads a novel variation on such a theory. In *Brooke Group* and similar cases, this Court adopted firm boundaries on antitrust liability for two general reasons: they help courts distinguish desirable pro-competition rules from undesirable pro-competitor rules, *see Brunswick Corp.*, 429 U.S. at 488, and they free businesses from a fear of treble damages whenever they do what firms are supposed to do in a healthy economy—*i.e.*, compete aggressively for business. The lower courts frustrate both of those objectives whenever they look for case-specific excuses to ignore those boundaries. The Court should grant certiorari to confirm both that antitrust law requires clear, determinate legal principles and that standards articulated in cases like *Brooke Group* reflect fundamental antitrust principles rather than narrow, formalistic legal rules.

II. THE DECISION BELOW IMPROPERLY IGNORES THE DOWNSTREAM IMPLICATIONS OF PREDATORY BUYING CLAIMS AGAINST MARKET INTERMEDIARIES

The Ninth Circuit's holding is not only indeterminate, but substantively incoherent, and it flouts the basic objectives of the antitrust laws.

As noted, the Ninth Circuit affirmed an instruction that permitted the jury to find that Weyerhaeuser violated Section 2 of the Sherman Act by paying "more than necessary" for timber or buying "more than it needed." The court reasoned that no more precise instruction was necessary because the allegedly unlawful conduct concerned an upstream market in which Weyerhaeuser purchased inputs for its business, rather than the downstream market in which it sold its products.

The notion of paying too high a price, standing alone, has no antitrust significance. Neither the Ninth Circuit nor the district court identified evidence that Weyerhaeuser could have purchased the same quantity of timber at a lower price. There is, in other words, no basis to conclude that Weyerhaeuser paid more than "necessary" to purchase the timber it acquired. Moreover, even if it had paid more than "necessary" in that respect, that fact would have been immaterial. The "overpayment" would not have reduced the amount of timber available to rivals or otherwise adversely affected competition; rather, it would simply mean that Weyerhaeuser had transferred money unnecessarily to its suppliers. No antitrust harm can flow from such a purely distributional transaction. And courts are poorly positioned in any event to "determin[e] what is a 'reasonable' or 'competitive' price." *Kartell* v. *Blue Shield of Mass., Inc.*, 749 F.2d 922, 927 (1st Cir. 1984) (Breyer, J.).

The real crux of the plaintiff's grievance, therefore, is not that the defendant paid "too much" for its timber, but that the defendant's willingness to pay more for sawlogs allowed it to buy more, leaving fewer for the plaintiff to buy at its preferred price. The ostensibly disjunctive jury instruction thus collapses into a single test: whether Weyerhaeuser

"purchased more logs than it needed." But input buying is plausibly characterized as anticompetitive only if, among other things, the buyer either wastes the inputs or cannot profitably sell the finished products derived from them in a downstream market. *See generally American Tobacco Co. v. United States*, 328 U.S. 781, 803-804 (1946) (finding anticompetitive the large-scale purchases of certain grades of tobacco that defendants did not use, but that their competitors did). Here, however, the Ninth Circuit affirmed liability even though it found neither waste nor unprofitability, and it endorsed a jury instruction that made waste and unprofitability unnecessary to the legal analysis.

The logical upshot of the Court's holding, therefore, is this: the defendant should have *restricted its output* in the downstream market for finished hardwood products, for that is the necessary result of reducing its purchase of inputs. Yet reductions in supply typically raise consumer prices, all else held equal, and one of the chief aims of antitrust enforcement is to *prevent* large firms from inefficiently restricting their output and thus increasing their prices. The Ninth Circuit's approach turns that objective on its head, inducing firms in Weyerhaeuser's position to behave more like monopolists on pain of antitrust liability if they do not. That is not the law. As *Brooke Group* confirms, courts undermine the very purpose of antitrust when they adopt rules that induce sellers to restrict output and raise prices. 509 U.S. at 223-227.

The Ninth Circuit arrived at this perverse result because, in its competitive analysis, it ignored the downstream, "sell-side" market for finished hardwood lumber. But the welfare of that market is part and parcel of any analysis of Weyerhaeuser's conduct in the upstream, "buy-side" market for alder sawlogs. At least in a single-input, single-output context such as that involved here, a claim of over-buying in the upstream market (buying inputs that a rival needs) collapses into a claim of over-selling in the downstream market (making sales that the rival needs). The gravamen of either claim is that the defendant is seeking unlawfully to

"squeeze" a rival middleman's margins: to preclude the rival from earning a profit in the downstream market given the higher costs and reduced availability of inputs in the upstream market.

Indeed, the Ninth Circuit noted this connection between the upstream and downstream markets when it stated that, "[i]n a predatory buying scheme, a firm pays more for materials in the short term, and thereby attempts to squeeze out those competitors who cannot remain profitable when the price of inputs increases." Pet. App. 9a-10a. But the court then ignored the significance of that connection. If the defendant itself is earning positive margins in the downstream market, its success "either reflects [its] lower cost structure . . . , and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks," *Brooke Group*, 509 U.S. at 223—in this case, risks of deterring economically efficient purchases and sales. As discussed, if a firm can resell its "excessive" upstream purchases at a profit in the downstream market, it would flout basic antitrust objectives to impose liability for "squeezing" its rival's margins. The threat of such liability would force the firm to cut production in the downstream market, to the detriment of its trading partners there, by reducing its acquisition of inputs in the upstream market, to the detriment of its trading partners in *that* market too.[7]

In these respects, the Ninth Circuit's analysis conflicts with *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), in which this Court implicitly recognized the impor-

---

[7] The Ninth Circuit thought it was significant that the supply of sawlogs was inelastic during the "alleged predation period." Pet. App. 11a. The court reasoned that Weyerhaeuser's conduct therefore could not benefit consumers by increasing the supply of logs. Apart from the court's inappropriate short-term focus in assessing the benefits of uninhibited marketplace competition, the court erred in not recognizing that overall output is expanded when more efficient middlemen are able to increase their purchases and sales.

tance of a unified buy-side, sell-side analysis in cases involving antitrust disputes between rival middlemen. There, the Court addressed the claim, similar to the plaintiff's claim here, that the defendant's market power "threaten[ed]" the plaintiff's "supply of [inputs in the upstream market] and its ability to compete" in the downstream market. *Id.* at 107. Specifically, the plaintiff alleged that the merger of two integrated beef packers would allow the resulting entity to "bid up the price it would pay for cattle, and reduce the price at which it [would sell] boxed beef," disadvantaging the plaintiff (also an integrated beef packer) in both the input and output markets. *Id.* at 114; *see also id.* at 108. The Court appropriately analyzed this "price-cost squeeze" allegation as a single predatory pricing claim. *See id.* at 114-119. It did not compartmentalize its analysis into separate buy-side (upstream) and sell-side (downstream) inquiries, much less make the Ninth Circuit's mistake of focusing almost entirely on the buy-side market to the exclusion of the sell-side market.

The Court's conclusions in *Cargill* also are instructive. The parties had presented two possible standards for liability: "(1) a threat of a loss of profits stemming from the possibility that [the defendant], after the merger, would lower its prices to a level *at or only slightly above* its costs," and "(2) a threat of being driven out of business by the possibility that [the defendant], after the merger, would lower its prices to a level *below* its costs." 479 U.S. at 114 (emphasis added). The Court found that only the latter theory—below-cost pricing—stated a proper antitrust claim. *Id.* at 114-119.[8] Like *Brooke Group*, *Cargill* thus reaffirms that, in cases in-

[8] The Ninth Circuit emphasized evidence that "Weyerhaeuser suffered declining profits due to the high prices it was paying." Pet. App. 17a. The decline could of course have reflected market forces beyond Weyerhaeuser's control. Even if it did not, moreover, the Ninth Circuit's decision is inconsistent with the Court's decisions in both *Cargill* and *Brooke Group*, which hold that the issue is not whether the court thinks a different strategy might have enabled the defendant to make bigger profits, but whether the chosen strategy caused the defendant to lose money.

volving competition among middlemen, a defendant's purchases of inputs in the upstream market can be predatory only if the result is below-cost pricing (combined with the prospect for recoupment) in the sell-side market for finished products.[9]

Ironically, if the plaintiff here *had* alleged that Weyerhaeuser so "bid up" the price of sawlogs that it sold its finished lumber at a loss, the Ninth Circuit likely would have followed *Cargill* and required proof of below-cost pricing to support such a "price-cost squeeze" claim. It is only because the plaintiff made no such allegation (*see* Pet. 5) that the Ninth Circuit felt free to ignore *Cargill* and *Brooke Group* and hold the plaintiff to an easier standard. It makes no sense, however, to hold plaintiffs alleging less culpable (or non-culpable) behavior to *less* rigorous standards for establishing liability. The Court should grant certiorari to clarify proper antitrust analysis in cases involving unilateral price and output conduct by competing intermediaries.

III. THE *BROOKE GROUP* ANALYSIS IS FULLY APPLICABLE HERE, EVEN APART FROM DOWNSTREAM ANALYSIS

Although *Brooke Group* involved claims of predatory selling rather than predatory buying, the basic logic of that decision applies whenever a plaintiff challenges a large

---

[9] Although respondent alleged below that Weyerhaeuser occasionally "stockpiled" the sawlogs it purchased (*see* Pet. 4), that allegation is both procedurally irrelevant and substantively without force. As a procedural matter, the court of appeals cited no basis for concluding that Weyerhaeuser wasted or did not use all of the inputs it purchased; just as important, the jury was not required to find such a basis. The allegation of stockpiling is thus irrelevant to this Court's review of the Ninth Circuit's decision upholding that verdict. In any event, evidence of "stockpiling," without more, is insufficient to establish antitrust liability in these circumstances because unused inputs could simply reflect (among other factors) changes in demand in the downstream market or in inventory costs, rather than predatory conduct. And if there were unused inputs, the costs incurred to purchase or dispose of them could be taken into account in determining whether the downstream market prices are sufficient to generate revenues in excess of the defendant's costs.

firm's unilateral decisions about price and quantity. *Brooke Group*'s animating principle is that antitrust rules concerning such decisions should be drawn narrowly enough to preserve every firm's incentives to compete vigorously with its rivals by, among other things, expanding its output to the benefit of its trading partners. *Brooke Group* applies that principle to protect a monopolist from antitrust liability when it competes against smaller firms by lowering retail prices and increasing output. But it is no less essential to protect a large firm's ability to compete against its rivals to the benefit of its trading partners when it bids for inputs, whether in the form of talented employees, research and development of new technologies, or (as here) raw materials. In each case, it would defeat the purpose of the antitrust laws to quell competition, reduce output, and disadvantage the trading partners simply to protect the rivals. To that general principle, *Brooke Group* carves out a single exception: where the dominant firm conducts its transactions at a loss with the purpose of excluding its rivals *and* enjoys a "dangerous probability" of recouping that loss to the *detriment* of its trading partners. 509 U.S. at 222, 224. That general principle, and its single exception, are as applicable to buying as to selling.

As explained in the previous section, the lawfulness of a market intermediary's buying practices in an upstream market can be judged only by reference to the intermediary's ability to cover its costs when selling finished products in the downstream market. But even a narrower focus solely on the upstream relationship between the intermediary and its supplier confirms the applicability of the *Brooke Group* analysis, as the petition here amply explains.

The Ninth Circuit deemed *Brooke Group* inapplicable to claims of predatory bidding principally because the court concluded that "excessive" purchases from an input supplier do not generate the immediate consumer surplus produced when a monopolist cuts prices in a retail market. Because the Supreme Court cited that consumer benefit as a key reason for adopting its rule constraining antitrust liability for

price cuts, *Brooke Group*, 509 U.S. at 223-224, 226-227, the Ninth Circuit concluded that no such rule could be appropriate in the absence of that benefit. *See* Pet. App. 8a-9a.[10]

This reasoning confuses means with ends. A fundamental objective of antitrust is the promotion of economic welfare through allocative efficiency. That objective favors rules that permit market incentives to produce lower prices in a concentrated retail market, where the main seller is a monopolist. *See Brooke Group*, 509 U.S. at 223-224, 226-227. But it likewise favors rules that permit market incentives to promote higher prices in a concentrated upstream market, where the main buyer is a monopsonist. The common theme, in either market, is the need for rules that foster greater quantities of output. And in each case, the question is whether the defendant can be presumed to promote the efficient allocation of resources when it enters into a business arrangement that is profitable for both itself and its trading partners (even if not for its competitors).

There is no reason to answer that question differently when the trading partners are suppliers of the inputs a defendant buys rather than retail customers of the finished products the defendant sells. And *Brooke Group* provides the same answer in both contexts: mutually beneficial ar-

---

[10] The Ninth Circuit separately purported to distinguish *Brooke Group* on the ground that the input market for alder sawlogs has high barriers to entry (*see* Pet. App. 11a), a proposition it did not base on any record evidence (*see* Pet. 17 n.7). This logic is perplexing. High barriers to entry could be relevant to the *Brooke Group* analysis only insofar as they are evidence of a firm's ability to recoup losses after a predation period (if, unlike Weyerhaeuser here, it is found to incur such losses). *See* 509 U.S. at 226. But the court of appeals deemed the likelihood of recoupment, like the *Brooke Group* principles more generally, to be legally irrelevant to a proper analysis of predatory buying claims. Its assumption about high barriers to entry thus amounts only to speculation that plaintiffs might have been able to meet the second *Brooke Group* condition for liability if only they had been instructed to consider it (and if only they could also meet the first condition, operating at a loss, which they could not). But the court's speculation about barriers to entry cannot be a basis for rejecting the applicability of *Brooke Group* in the first place.

rangements between a firm and its trading partners should be trusted to produce economically efficient outcomes so long as the firm does not thereby operate at a short-term loss in the realistic hope of long term gain through the exclusion of rivals. Indeed, even if the firm *does* operate at a short-term loss, an antitrust court should not intervene unless there is in fact a dangerous probability that the firm will succeed in recouping that loss from its trading partners after driving its current rivals out of the market. 509 U.S. at 224-226. Here, too, there is no reason to suppose that recoupment is more likely to succeed after predatory bidding than after predatory price-cutting.

In sum, except where a plaintiff can satisfy the *Brooke Group* standards for antitrust liability, economic welfare is best served over the long run by leaving unilateral price and quantity decisions to market dynamics. The decision below, however, permits a finding of liability even when the defendant's conduct remained profitable in the short term and even when the defendant would be incapable of recouping its losses in any event. That decision thus substitutes the subjective and unpredictable "fairness" judgments of factfinders for the bright-line *Brooke Group* rule that has brought much-needed certainty to predatory pricing cases. This Court should intervene to reverse the decision below and restore analytical clarity to this critical area of law.

CONCLUSION

The petition for certiorari should be granted, and the judgment below should be reversed.

Respectfully submitted,

A. DOUGLAS MELAMED
Counsel of Record
JONATHAN E. NUECHTERLEIN
DAVID S. MENDEL
DANIEL MCCUAIG
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000
Counsel for Amici Curiae

MARC GARY
ALAN L. SILVERSTEIN
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Suite 1800
Atlanta, GA 30309-3610
Counsel for Amicus Curiae BellSouth Corporation

JAMES D. ELLIS
PAUL K. MANCINI
MARTIN E. GRAMBOW
WILLIAM M. SCHUR
SBC COMMUNICATIONS INC.
175 E. Houston Street
San Antonio, TX 78205
Counsel for Amicus Curiae SBC Communications Inc.

DUNCAN A. STUART
SCOTT R. PENNOCK
THE DOW CHEMICAL COMPANY
2030 Dow Center
Midland, MI 48674
Counsel for Amicus Curiae Dow Chemical Co.

JOHN THORNE
PAUL J. LARKIN, JR.
VERIZON COMMUNICATIONS INC.
1515 North Court House Road
Arlington, VA 22201
Counsel for Amicus Curiae Verizon Communications Inc.

CHRISTOPHER P. FROST
11120 N.E. 2nd Street
Suite 220
Bellevue, WA 98004
Counsel for Amicus Curiae Dunn Lumber Co.

THOMAS W. BURT
RICHARD J. WALLIS
KEVIN KEHOE
MICROSOFT CORPORATION
One Microsoft Way
Redmond, WA 98052
Counsel for Amicus Curiae Microsoft Corporation

OCTOBER 2005